A

PP

v.

HANIF BASREE ABDUL RAHMAN

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI PCA
ARIFFIN ZAKARIA FCJ
NIK HASHIM FCJ
HASHIM YUSOFF FCJ
C ZULKEFLI MAKINUDIN FCJ
[CRIMINAL APPEAL NO: 05-4-2005(W)]
28 MARCH 2008

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal -*
D *Acquittal and discharge of accused without defence being called - Issues of evidence - Credibility of witnesses - Circumstantial evidence - Whether accused correctly acquitted and discharged*

CRIMINAL PROCEDURE: *Acquittal or discharge - Acquittal of*
E *accused without calling upon defence - Murder - Appeal - Issues of evidence - Credibility of witnesses - Circumstantial evidence - Whether accused correctly acquitted and discharged*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case -*
F *Appeal - Acquittal and discharge of accused of murder without defence being called - Issues of evidence - Credibility of witnesses - Circumstantial evidence - Whether accused correctly acquitted and discharged*

EVIDENCE: *Witness - Credibility of - Rejection of evidence of witnesses - Whether correct*

G

EVIDENCE: *Burden of proof - Circumstantial evidence - Close of prosecution's case - Principles applicable - Whether prosecution discharged burden - Whether trial judge right in not calling for defence at close of prosecution*

H

The respondent/accused in this appeal was charged with the murder of his intimate friend, one Noritta Samsuddin ('deceased'), on 5 December 2003 between 1.30am and 4am in a condominium located in Sri Hartamas, Kuala Lumpur. At the close of the prosecution's case, he was acquitted and discharged by the trial
I judge without being called for his defence. This was the Public Prosecutor's appeal against the dismissal of that appeal – against the trial judge's decision – by the Court of Appeal. The

deceased's body was found by her apartment mates, SP12 and SP28 respectively, at about the time mentioned in the charge. She was found facing downwards and with her mouth stuffed with two face towels. Her hands were tied behind her back with a black brassiere while her legs were tied with a black electrical cord. The Senior Investigating Officer ('SIO') recovered wet tissue papers from a waste paper basket in the deceased's room. The issues that were disputed were: (i) whether, from the pathologist's and chemist's evidence, it could be irresistibly concluded that the accused was the last person to have had sexual intercourse with the deceased and, therefore, was the one who caused her death; (ii) the conclusion to be drawn from the recovery of the wet tissue papers from the waste paper basket in the deceased's room by the SIO; (iii) whether there was a man with foul body odour present in that room on the night of the incident; (iv) whether there was an unknown male who had been referred to as "Unknown Male 1"; and (v) whether the two guards on duty at the condominium that night, SP10 and SP11 respectively, did actually see the accused together with the deceased a few hours before her death.

Held (dismissing the appeal)
Per Zaki Tun Azmi PCA delivering the judgment of the court:

(1) At first sight the wet tissues discovered in the waste paper basket in the deceased's room, subsequently proven to be stained with the semen of the accused, seemed to support the prosecution's case but on closer examination, they did not. The defence rightly pointed out that the tissues were found under a pile of clothing. In this respect the chemist, at the request of the Deputy Public Prosecutor ('DPP'), conducted a test by putting a few drops of semen that he got from his laboratory refrigerator on a couple of tissue papers. According to him, it took between one and one-half hours in an air-conditioned room for them to dry up. From this, according to the DPP, since a substantial amount of the accused's semen was found on the tissue papers, still wet, the accused must have used these tissue papers not long before they were discovered – within one and one-half hours – by the SIO. However, it did not need an expert to know the different effects *viz*. the tissue papers that were dripped with semen and spread out in an air-conditioned room would dry very much faster than if kept in a form of a ball under a stack of

clothing. There was also no evidence as to the amount of semen used by the chemist in his experiment compared to that found on the contaminated tissues. (para 8)

(2) It must be noted that the evidence of the man with the foul body odour was introduced by the prosecution. Although the learned DPP attempted to argue that the accused's body could have given out such an odour after having sexual intercourse with the deceased and having worked hard to tie her hands and legs, there was not an iota of evidence whatsoever to support his contention. On the contrary, SP28 did say that the accused did not have such body odour. This statement by SP28 (who was the prosecution's witness) was not challenged by the prosecution. Neither was any attempt made by the prosecution to show any disagreement with SP28's evidence during examination. SP12 also said that he had never experienced such body odour before, which the prosecution seemed to have accepted since there was no questioning on this issue. SP28 stated that she caught a glimpse of a man while in the apartment and she later testified that she saw someone putting on his shirt while walking away from the condominium. From the evidence so far, there was the person with the foul body odour and the other person who was seen walking away while putting on his shirt. There was no proof that they were one and the same person. (paras 10, 11 & 12)

(3) The chemist found the DNA of an unidentified male person from the deceased's vagina, the swab from the deceased's rectum, the semen stain on the bolster, the black brassiere, the finger nail clippings of the deceased's left hand, the strand of hairs found on the comforter and, finally, the electrical cord used to tie the legs of the deceased. The chemist referred to this person as "Unknown Male 1". (para 13)

(4) During cross-examination, SP10 clarified that he did not tell the police that he saw the accused and the deceased that night or at any other time until 18 December 2003. He only disclosed that fact after 13 days of daily visits to the police station and only after he was arrested and remanded as a suspect. Prior to his arrest he told the police that the last time he saw the accused was on the night of 4 December 2003. According to him, after he told the police that he saw the accused and the deceased on the morning of 5 December

2003, the police released him. SP11 also did not tell the police of this incident until about 19 December 2003. He was also under arrest and detention when he claimed to have revealed this to the police. SP11 could not explain when questioned by the defence as to how the accused could have left the condominium if the accused was really there on the morning of 5 December 2003. He also confirmed in his re-examination that the accused had to pass him to go out and yet he did not see the accused leaving the condominium that night. Thus, there was nothing to support the contention that the trial judge had erred in rejecting the evidence of SP10 and SP11. In fact, the judge was right in rejecting the evidence of these two witnesses with regard to them having seen the accused and the deceased in the early morning of 5 December 2003. (paras 18, 19 & 20)

(5) The prosecution's case became hampered with the existence of the DNA belonging to "Unknown Male 1". Several inferences could be made from the findings of such evidence on the body of the deceased. The discovery of the accused's DNA profile on the deceased's body *per se* could not be sufficient to conclude that he had caused her death. There could be many explanations why his DNA was found on her body. Bearing in mind the accused's intimate relationship with the deceased, innocent explanations could be given of such findings. If there were reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him and he must be acquitted and discharged. (paras 24 & 25)

(6) The trial judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing circumstantial evidence, particularly as in this case, when there was a reasonable likelihood of the existence of another person who could have committed the offence. For the reasons discussed above, the prosecution had not discharged its burden in this case. The most damning evidence against the prosecution was the presence of the man with the foul body odour in the apartment and the scientifically proven DNA of "Unknown Male 1" recovered from the deceased's body, which remained unrebutted. The trial judge was right in deciding not to call for the defence at the close of the prosecution, and acquitting and discharging the accused at that stage. (paras 34, 35 & 36)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden/tertuduh dalam rayuan di sini dituduh atas kesalahan membunuh teman intimnya, seorang Noritta Samsuddin ('simati'), pada 5 Disember 2003 di antara jam 1.30 pagi hingga 4 pagi di
B sebuah kondominium yang terletak di Sri Hartamas, Kuala Lumpur. Di penutup kes pendakwaan, beliau telah dilepas dan dibebaskan oleh hakim bicara tanpa memanggil pembelaan beliau. Ini adalah rayuan Pendakwa Raya terhadap penolakan rayuannya terhadap keputusan hakim bicara tersebut oleh Mahkamah Rayuan. Mayat
C simati telah dijumpai oleh dua rakan se apartmennya, iaitu SP12 dan SP28, lebih kurang pada masa seperti yang disebut di dalam pertuduhan. Beliau dijumpai dalam keadaan tertiarap dengan mulutnya disumbat dengan dua helai tuala muka. Tangan beliau pula diikat kebelakang dengan menggunakan coli berwarna hitam
D sementara kakinya diikat dengan menggunakan wayar letrik berwarna hitam. Pegawai Penyiasat ('SIO') menjumpai beberapa kertas tisu basah dari bakul sampah di dalam bilik simati. Isu-isu yang dipertikai adalah: (i) sama ada, dari keterangan-keterangan ahli patologi dan kimia, ianya boleh dirumuskan secara pasti bahawa
E tertuduh adalah orang yang terakhir yang mengadakan hubungan seks dengan simati, dan oleh itu adalah orangnya yang menyebabkan kematian simati; (ii) konklusi yang boleh dibuat dari penemuan kertas tisu basah dari bakul sampah di dalam bilik simati oleh SIO; (iii) sama ada wujud seorang lelaki yang mempunyai bau
F badan yang busuk di dalam bilik tersebut pada malam kejadian; (iv) sama ada wujud seorang lelaki tidak dikanali yang dirujuk sebagai "Lelaki Tak Dikenali 1"; dan (v) sama ada dua orang pengawal keselamatan yang bertugas di kondominium pada malam tersebut, iaitu SP10 and SP11, sebenarnya telah melihat tertuduh bersama-
G sama dengan simati beberapa jam sebelum kematian simati.

Diputuskan (menolak rayuan)
Oleh Zaki Tun Azmi PMR menyampaikan penghakiman mahkamah:

H **(1)** Sekali imbas, tisu-tisu basah yang dijumpai dari bakul sampah di dalam bilik tertuduh, yang kemudian dibuktikan dikotori air mani tertuduh, tampak menyokong kes pendakwaan, tetapi ia sebenarnya tidak begitu apabila diteliti dengan lebih terperinci. Pembelaan telah dengan betulnya menyatakan bahawa tisu-tisu
I ditemui di bawah selonggok kain. Dalam hubungan ini, ahli kimia, atas permintaan Timbalan Pendakwa Raya ('DPP'), telah melakukan ujian dengan meletakkan beberapa titik air

mani yang beliau ambil dari peti sejuk makmalnya ke atas beberapa helai kertas tisu. Menurut beliau, ia mengambil masa antara sejam dan sejam setengah untuk kertas-kertas tisu tersebut mengering di dalam bilik yang berhawa dingin. Dari keadaan itu, menurut DPP, oleh kerana sejumlah besar air mani tertuduh dijumpai di atas kertas-kertas tisu tersebut yang masih berkeadaan basah, maka tertuduh semestinya telah menggunakan kertas-kertas tisu itu sejurus sebelum ianya ditemui oleh SIO – iaitu kira-kira sejam atau sejam setengah sebelum itu. Bagaimanapun, ianya tidak memerlukan seorang pakar untuk mengetahui perbezaan-perbezaannya, yakni, kertas-kertas tisu yang dibasahi oleh air mani dan mengembang di dalam bilik yang berhawa dingin akan mengering dengan lebih cepat jika disimpan di dalam bentuk bebola di bawah longgokan kain. Selain itu, tidak terdapat keterangan mengenai jumlah air mani yang digunakan oleh ahli kimia dalam ekperimennya berbanding dengan apa yang ditemui pada tisu-tisu yang dikotori tersebut.

(2) Perlu dinyatakan bahawa keterangan orang yang mempunyai bau badan yang busuk adalah dikemukakan oleh pendakwaan. Walaupun yang arif DPP cuba berhujah bahawa badan tertuduh boleh mengeluarkan bau tersebut selepas melakukan hubungan seks dengan simati dan selepas bekerja keras untuk mengikat tangan dan kaki simati, tidak terdapat sekelumit pun keterangan untuk menyokong hujah ini. Sebaliknya, SP28 ada menyatakan bahawa tertuduh tidak mempunyai bau badan sebegitu. Kenyataan oleh SP28 ini (yang merupakan saksi pendakwaan) tidak dicabar oleh pendakwaan. Juga tiada percubaan dibuat oleh pendakwaan semasa pemeriksaan untuk menunjukkan ketidak-setujuannya dengan keterangan SP28. SP12 juga menyatakan beliau tidak pernah mengalami bau badan yang sedemikian rupa, keterangan mana nampaknya telah diterima oleh pendakwaan memandangkan tiada soalan dibangkitkan mereka atas isu ini. SP28 menyatakan bahawa beliau telah melihat imbasan seorang lelaki semasa berada di apartmen dan beliau juga kemudian berkata bahawa beliau melihat seseorang sedang menyarung baju ketika berjalan keluar dari kondominium. Setakat keterangan-keterangan yang ada, wujud seorang yang mempunyai bau badan yang busuk dan seorang lagi yang dilihat berjalan keluar sambil memakai bajunya. Tiada bukti bahawa mereka adalah orang yang satu dan sama.

(3) Ahli kimia menemui DNA seorang lelaki yang tidak dikenalpasti dari kemaluan simati, cebisan kapas dari usus simati, kotoran air mani pada bantal peluk, coli hitam, keratan kuku jari tangan kiri simati, beberapa helai rambut di atas comforter, dan akhir sekali dawai letrik yang digunakan untuk mengikat kaki simati. Ahli kimia merujuk kepada orang ini sebagai "Lelaki Tak Dikenali 1".

(4) Semasa pemeriksaan balas, SP10 menjelaskan bahawa beliau tidak memberitahu polis bahawa beliau telah melihat tertuduh dan simati pada malam tersebut atau pada bila-bila masapun sehinggalah 18 Disember 2003. Beliau hanya mendedahkan fakta itu selepas lawatan berturut-berturut 13 hari ke balai polis dan hanya setelah beliau ditangkap dan ditahan sebagai suspek. Sebelum beliau ditangkap beliau telah memberitahu polis bahawa kali terakhir beliau melihat tertuduh adalah pada malam 4 Disember 2003. Menurut beliau, selepas beliau memberitahu polis bahawa beliau telah melihat tertuduh dan simati pada pagi 5 Disember 2003, pihak polis telah melepaskannya. SP11 juga tidak memberitahu polis mengenai kejadian sehinggalah lebih kurang 19 Disember 2003. Beliau juga telah ditangkap dan berada dalam tahanan apabila beliau mendakwa mendedahkan hal tersebut kepada polis. SP11 gagal menjelaskan apabila disoal oleh pembelaan bagaimana tertuduh boleh meninggalkan kondominium jika tertuduh sebenarnya berada di situ pada pagi 5 Disember 2003. Beliau juga mengesahkan dalam pemeriksaan balasnya bahawa tertuduh mesti melepasi beliau jika hendak keluar, namun beliau tidak melihat tertuduh meninggalkan kondominium pada malam tersebut. Oleh itu, tiada apa yang boleh menyokong hujah bahawa hakim bicara khilaf dalam menolak keterangan-keterangan SP10 dan SP11. Malah, hakim betul bilamana menolak keterangan kedua-dua saksi ini berkaitan dakwaan bahawa mereka telah melihat tertuduh dan simati di awal pagi 5 Disember 2003.

(5) Kes pendakwaan terjejas oleh kewujudan DNA milik "Lelaki Tak Dikenali 1". Beberapa inferens boleh dibuat dari penemuan keterangan tersebut pada tubuh simati. Penemuan profil DNA tertuduh pada tubuh simati *per se* tidak mencukupi untuk merumuskan bahawa beliau telah menyebabkan kematiannya. Mungkin wujud banyak penjelasan kenapa DNA beliau berada pada tubuh simati. Mengambilkira, hubungan intim tertuduh dengan simati, penjelasan-penjelasan tidak

bersalah boleh dibuat atas penemuan tersebut. Jika terdapat penjelasan munasabah mengenai kenapa DNA tertuduh dijumpai dalam keadaan sedemikian, manfaatnya haruslah diberikan kepada beliau dan beliau mestilah dilepas dan dibebaskan.

(6) Hakim bicara telah meneliti dengan betulnya keterangan yang dikemukakan di hadapannya dan telah menggunapakai prinsip-prinsip yang betul apabila menilai keterangan ikut keadaan, terutama dalam keadaan terdapat kemungkinan munasabah wujudnya seorang lain yang mungkin telah melakukan jenayah tersebut, seperti yang berlaku dalam kes ini. Atas sebab-sebab yang dibincangkan di atas, pendakwaan gagal melupuskan beban yang dipikulnya dalam kes ini. Keterangan yang paling menjejaskan pendakwaan adalah kehadiran lelaki yang mempunyai bau badan yang busuk di apartmen dan pembuktian secara saintifik DNA "Lelaki Tak Dikenali 1" yang ditemui pada badan simati, yang sehingga kini tidak disangkal. Hakim bicara betul dalam memutuskan untuk tidak memanggil pembelaan di akhir kes pendakwaan dan dalam melepas dan membebaskan tertuduh.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Belhaven & Stenton Peerage [1875-1976] App Cas 278 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Dato Mokhtar Hashim v. PP [1983] 2 MLJ 232 ***(refd)***
Idris v. PP [1960] 1 MLJ 296 ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Muhamad Nasir Sharuddin & Anor [1994] 2 MLJ 576 ***(refd)***
R v. Abbot [1955] 2 All ER 899 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1), (2), (3)
Federal Constitution, art. 7

For the appellant - Wong Chiang Kiat (Roszianayati Ahmad & Nurulhuda Nuraini Mohd Nor with him); A-G's Chambers
For the respondent - Dato' V Sithambaram (Rajivan Nambiar, Mohd Haaziq Pillay & Robert Devan with him); M/s Sitham & Assoc

Reported by Suresh Nathan

A

JUDGMENT

Zaki Tun Azmi PCA:

[1] The respondent in this appeal who is the accused (and hereinafter referred to as "the accused") was charged for the murder of his intimate friend, one Noritta binti Samsuddin (hereinafter referred to as "the deceased") on the 5 December 2003 between 1.30am and 4am in an apartment known as D-7-1 Kondominium Puncak Prima, Galeria, Jalan 17, Sri Hartamas, Kuala Lumpur. At the close of the prosecution's case he was acquitted and discharged by the learned trial judge without being called for his defence. The Public Prosecutor now appeals to this court against the dismissal of that appeal by the Court of Appeal.

[2] The deceased's body was found by her apartment mates, Kenneth Michael Yap Tiek Huat (SP12) and his girl friend and roommate, Nor Azora bte. Abdul Hamid (SP28) at about the time mentioned in the charge. She was found facing downwards and with her mouth stuffed with two face towels. Her hands were tied behind her with a black brassiere. Her legs were also tied but with a black electrical cord. Wet tissue papers were recovered from a waste paper basket in the deceased's room by SP29, ASP Shahrul Lailli bin Masduki, the Senior Investigation Officer (SIO).

Issues

[3] The facts of the case were very well spelt out in the judgment of the High Court and that of the Court of Appeal. I do not need to regurgitate them here. I will only refer to those facts that are subject of dispute. Broadly, the main issues are:

a) Whether from the pathologist's and chemist's evidence it can be irresistibly concluded that the accused was the last person to have sexual intercourse with the deceased and therefore was the one who caused her death.

b) What can be concluded from the recovery of the wet tissue papers from the waste paper basket in the deceased's room by the SIO?

c) Was there a man with foul body odour present in that room on the night of the incident?

d) Was there an unknown male who had been referred to as "Unknown Male 1"?

e) Whether the two guards did actually see the accused together with the deceased and two Malay couples in a Kancil a few hours before her death.

Pathologist And Chemist Findings

[4] The deceased's body was taken for post mortem which was carried out by Dr. Abdul Halim bin Mansor who was the Director of Institute of Forensic Medicine, Hospital Kuala Lumpur (SP13). From the post mortem the following are what, amongst others, SP13 discovered:

a. She had died of asphyxia.

b. The brassiere and the electrical cord were tied to the deceased's hands and feet respectively, **after** her death.

c. He discovered hymen tears in the external genitalia of the deceased which must have been caused **more** than 72 hours before she died.

d. Tears were also found at the deceased's anus but these tears occurred **less** than 72 hours before her death. These tears, in his opinion, could have been caused by a blunt object like the penis or finger.

   The DNA profile from the swabs taken from this part of the deceased's body showed that it belonged, to use the words of the chemist, Mr. Lim Kong Boon, Government Chemist attached to the Government Chemistry Department, Petaling Jaya (SP14), – "to an 'Unknown Male 1' ". It did not match the DNA profile of the accused.

e. In the deceased's vagina the pathologist found "… terdapat cecair bertakung di dalam vagina simati dengan banyak. Banyak cecair seperti ini dari pengalaman saya luar biasa …". He said the fluid found was the result of ejaculation of semen together with fluid of the deceased.

[5] I now go to the findings of the chemist. According to the chemist (SP14) the estimated composition of the DNA extracted from the semen found in the vaginal swab of the deceased is as follows:

(a) Major contributor 60 – 70% which is that of the accused;

(b) The intermediate contributor 20 – 25% which is that of the deceased and

(c) the minor contributor of 10 – 15% which is of the unknown male

[6] In his opinion "... based on the DNA result obtained from the mixed semen stains from "high vaginal swab", normally indicates that the major contributor is the last person to have sex with the victim." He qualified his opinion by saying that "However, this finding or inference is dependant on a number of factors, such as:

1. The volume of semen ejaculated into the vagina;
2. The number of spermatozoa contained in the ejaculated semen; and
3. The lapse of time between the 2 sexual intercourses where semen were ejaculated into the vagina.

[7] Other relevant exhibits of forensic evidence discovered by the chemist (SP14) were as follows:

a. Eleven (11) pieces of tissue papers found in the waste paper basket in the deceased's room which contained DNA of the accused and the DNA of the deceased. The prosecution relied heavily on this evidence to support their case. They contend that because the tissue papers were still wet when the tissue papers were found by the SIO, at about 7am that morning and since these tissue papers contained the DNA of the accused, the accused must have been the last person to have sexual intercourse with the deceased. This evidence, according to the prosecution is supported by the other opinion of the chemist (SP14) on the high proportion of the accused's DNA in the fluid found in the vagina of the deceased, which showed that the accused was the last person to have sexual intercourse with the deceased.

b. The black brassiere that was used to tie the hands of the deceased was found to bear the DNA of Unknown Male 1.

c. Finger nail clippings of the deceased's right hand fingers also have the accused's DNA and the finger nail clippings of the deceased left hand fingers had the DNA of the accused as well as that of the Unknown Male 1.

d. Strands of hairs recovered from the deceased's comforter and bed sheet also bear the DNA belonging to Unknown Male 1.

e. The electrical cord used to tie the deceased's legs had the DNA of the Unknown Male 1 as well as that of the deceased.

Tissues

[8] At first sight the wet tissues discovered in the waste paper basket in the deceased's room, subsequently proven to be stained with the semen of the accused, seem to support the prosecution's case but on closer examination, they do not. The defence rightly pointed out to the court that the tissues were found under a pile of clothings ie "… yang pertama ialah sehelai baju tidur, kedua sehelai seluar pendek warna hitam, ketiga satu coli warna beige, keempat segumpal tisu …" The tissues were crumpled up together ("segumpal"). In this respect the chemist at the request of the DPP did a test of putting a few drops of semen that he got from his laboratory refrigerator, on a couple of tissue papers. According to him it took between 1 to 1 1/2 hours in an air conditioned room for them to dry up. From this, according to the learned DPP, since a substantial amount of the accused's semen was found on the tissue papers, and still wet, accused must have used these tissue papers not long before they were discovered by the SIO. From the test conducted by the chemist, it is urged by the learned DPP that the accused could have used the tissue papers within 1 to 1 1/2 hours before the tissue papers were found. It appears to me it does not need an expert to know the different effects *viz*. the tissue papers that were dripped with semen and spread out in an air conditioned room will dry very much faster than if kept in the form of a ball under stack of clothing. There is also no evidence as to the amount of semen used by the chemist in his experiment compared with that found on the contaminated tissues.

The Man With The Foul Body Odour/Unknown Male 1

[9] SP12 and his girl friend cum roommate SP28 arrived at the condominium at about 4am in the early morning of 5 December 2003. On their arrival they found the door to their apartment locked. When they went in they did not switch on the lights as they had intended to go to bed immediately. SP28 said that on opening the door "… ada hidu bau busuk macam bau badan dan keadaan rumah gelap… dan busuk itu daripada mula masuk pintu utama rumah sehingga kawasan meja makan …". She then looked for the source of the odour. She was expecting a friend of the deceased to be sleeping in the lounge area. As she was looking for the source of this odour "… saya terpandang susuk tubuh orang di sebelah kanan saya, sekali imbas ..." Ignoring that she proceeded to her room but at this point in time, she noticed that the entrance door which she and her roommate SP12 had earlier

A locked had been unlocked ("tidak berkunci"). She sensed something was wrong and asked SP12 to call the guard. In the mean time she proceeded to the deceased's room and called out the deceased's name. There was no answer. She went into the room and that was when she discovered the deceased under the B blanket in the condition described earlier in this judgement.

[10] Apart from the evidence of SP28 that she saw a glimpse of a man while in the apartment, she testified later she also saw someone putting on his shirt while walking away from the C condominium. She called out to the man and the guard. There was no response from either of them. She then went down to look for the man but to no avail. The same was told by SP12. He further said that he never experienced such body odour before. If, according to the evidence of the prosecution, the D accused had been visiting the apartment before and that the body odour belonged to the accused they should have experienced such odour. The prosecution seemed to have accepted the evidence of the SP12 since there was no questioning on this issue.

E **[11]** It must be noted that the evidence of the man with the foul body odour was introduced by the prosecution. Although in his submission the learned DPP attempted to argue that the accused's body could have given out such an odour after having sexual intercourse with the deceased and having worked hard to tie her hands and her legs, there was however not an iota of evidence F whatsoever to support his contention. On the contrary SP28 did say that the accused did not have such a body odour. This statement by SP28, (who is the prosecution's witness) was not challenged by the prosecution. Neither was any attempt made by the prosecution to show any disagreement with this evidence of G SP28 during examination.

[12] From the evidence so far, we have the person with the foul body odour and the other person who was seen walking away while putting on his shirt. There is no proof that they were one H and the same person.

Unknown Male 1

[13] The chemist found DNA of an unidentified male person from the deceased's vagina, swab from the deceased's rectum, semen I stain on the bolster, the black brassiere, finger nail clippings of the left hand of the deceased, strand of hairs found on the comforter and finally the electrical cord used to tie the legs of the deceased. The chemist referred to this person as the "Unknown Male 1".

Kancil And Two Malay Couples

[14] Now comes the question whether the accused and the deceased did go up to her apartment after allegedly meeting their friends at the car park earlier to the discovery of the deceased's body.

[15] The prosecution sought to support their case against the accused by adducing evidence of the two guards to the condominium. They were SP10 and SP11. The learned trial judge rejected the evidence of these two witnesses as being unreliable.

[16] SP10 and SP11 were two guards on duty at the condominium that night. According to them they had seen the deceased and the accused on many occasions at the condominium before.

[17] In his examination in chief, SP10 testified as follows. He said that at about 1am that night, he saw the deceased and the accused going out in front of the guardhouse located next to the road. He saw both of them chatting with two other men and two women. These two couples had come to the condominium in a white coloured Kancil car. The place where they were chatting was sufficiently bright. The Kancil was parked under a street lamp. He saw them chatting for about 10 to 15 minutes. He saw the registration number of the Kancil but could not remember it. After that the accused and the deceased went back into the condominium passing the guardhouse. They went through a small door at the right side of the guardhouse. He saw the accused before 1am that night ie, a few hours before the commission of the alleged offence. The accused was wearing jeans with long sleeved white T-shirt with grip cuffs. The deceased on the other hand was wearing short pants up to her knees with a long T-shirt.

[18] During cross examination SP10 clarified that he did not tell the police that he saw the accused and the deceased that night or at any time until 18 December 2003. He only disclosed these facts after 13 days of daily visits to the police station and only after he was arrested and remanded as a suspect. Prior to his arrest he told the police that the last time he saw the accused was on the night of the 4th. According to him after he told the police on the 17 or 18 December 2003 that he saw the accused and the deceased on the 5th morning, the police released him.

[19] SP11 gave similar testimony regarding the white Kancil and the two Malay couples. As regards the apparel worn by the accused and the deceased on the night of the incident, SP11 said the accused was wearing blue jeans and grey coloured T-shirt while the deceased was wearing black shorts and singlet. SP11 also did not tell the police of this incident until about the 19 December 2003 ie, 14 days or so after the incident. Prior to 19 December 2003 SP11 kept telling the police the last time he saw the accused and the deceased walking into the condominium was on the 4 December 2003. He was also under arrest and detention when he claimed to have revealed this to the police. He was arrested on 19th and released on 20 December 2003. SP11 was then also accused of having committed the offence. He could not explain when questioned by the defence as to how the accused could have left the condominium if the accused was really there in the morning of 5 December 2003. Cross examination on him was as detailed as that done on SP10. In this respect SP11 confirmed in his re-examination that the accused had to pass him to go out and yet he did not see the accused leaving the condominium that night.

[20] There is nothing to support the contention that the trial judge had erred in rejecting the evidence of SP10 and SP11. In fact reading through the notes of evidence in detail, and for reasons discussed earlier, I am of the view that the judge was right in rejecting the evidence of these two witnesses with regard to them having seen the accused and the deceased in the early morning of 5 December 2003.

DNA As Proof Of Identity

[21] The discovery of the use of DNA (deoxyribonucleic acid) has really revolutionized criminal investigations. Its use has assisted in getting convictions of the guilty and release of the innocent.

[22] The prosecution's case is based on the discovery of DNA of the deceased, accused, and the "Unknown Male 1". Simply put, in practice, the DNA profile of a person can only belong to that person and that person only. The likelihood of another person having an identical DNA to him, according to SP14, is in the proportion of, something like, between 1 in 41 million, to 330 x 10^{18}, in 6.2 quintillion (6.2 x 10^{18}) calculated based on Malaysian Malay database depending on the type of specimen. In other words such proof is practically conclusive. But in order to be able to utilize DNA for identification of a person, the person who has that DNA profile must be identified and related to a

sample of his body fluid or any other part of his body. An expert in DNA can only say whether the DNA belongs or does not belong to an identified person. DNA found without a suspect is of no use.

[23] Therefore it is only when a person is identified and the DNA matches that of the identified person can it be of any use towards solving a crime investigation. But even then the prosecution needs to go one step further to show that the DNA of the suspect (together with any other evidence) is such that it points to one conclusion only, ie, that the offence was committed by the suspect.

[24] In this case the DNA of the "Unknown Male 1" becomes useful only to determine that the DNA belongs to that man. Unfortunately the identity and therefore DNA of that person was unknown. Perhaps sometime in the future there will be a register of DNA profiles like what we now have of thumbprints which will assist the police to trace the owner. The accused's DNA found in circumstances that may have created suspicion of his guilt is not enough to prove his guilt. If there are reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him and he must be acquitted and discharged.

[25] In this case, the prosecution's case becomes hampered with the existence of the DNA belonging to the "Unknown Male 1". Several inferences could be made from the findings of such evidence on the body of the deceased. The discovery of the accused's DNA profile on the body of the deceased *per se* cannot be sufficient to conclude that he caused her death. There could be so many explanations why his DNA was found on her body. Bearing in mind the accused's intimate relationship with the deceased, innocent explanations could be given of such findings. The accused is not charged with having intimate relations with the deceased.

Circumstantial Evidence

[26] Since the prosecution is relying on circumstantial evidence to prove its case it would be pertinent for me to briefly cite the relevant aspect of the law on circumstantial evidence.

[27] Circumstantial evidence is defined in no better words than in the remarks in the case of *Idris v. PP* [1960] 1 MLJ 296, which quoted Lord Cairns' in the House of Lords case of *Belhaven & Stenton Peerage* [1875-1976] App. Cas. 278 at p 279:

A My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them
B insufficient but all converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[28] The learned trial judge in *Idris v. PP* said:

C In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test. If it leaves gaps
D then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

[29] The Court of Appeal in the present case said:

E Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chun Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22; [1962] MLJ 307). There is insufficient evidence to connect the respondent with the killing.
F Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at
G all. (See *Idris v. Public Prosecutor* [1960] 1 LNS 40; [1960] MLJ 96)

[30] Abdoolcader FJ in *Dato Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232 at p. 275 said:

H Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the Court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors.*
I *v. PP* [1979] 1 LNS 36)

[31] The trial judge in this case must therefore view all the evidence before him and decide whether all the evidence taken together is sufficient to prove the offence against which the accused is charged.

Burden Of Proof

[32] The prosecution's gravamen is that the trial judge and the Court of Appeal had placed too heavy a burden on the prosecution at the close of its case. On 31 January 1997 s. 180 of the Criminal Procedure Code was amended by requiring the prosecution to make out a *prima facie* case at the end of its case. Section 180(1), (2), (3) now reads:

> **180. Procedure after conclusion of case for prosecution.**
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[33] Prior to this amendment, as a result of the decision in *Haw Tua Tau*, there had been heated discussions on the term *prima facie* in relation to burden of proof at the close of the prosecution case. After the amendment, the discussions on this subject continued culminating in *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, both Federal Court judgments. Since then, Parliament has introduced the definition of *prima facie*. That term is now defined as *"where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction"*. The saga of "the *prima facie* case" will continue when the curtain rises again in the near future. For now, it is not necessary to go into that subsection since it cannot apply retrospectively to our present case since it affects the substantial rights of the accused. There is nothing to indicate any intention as to its retrospective effect but even if it does, it would run foul of art. 7 of the Federal Constitution (see *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 at pp. 663 to 665) and *Public Prosecutor v. Ishak Hj. Shaari & other appeals* [2003] 3 CLJ 843 at pp. 851 and 852).

A At this stage, I should not be expressing any views on its interpretation without the benefit of a full argument.

Conclusion

B **Judgment of the Court of Appeal Upheld**

[34] I have read through the judgments of the learned trial judge and the Court of Appeal and find that the trial judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing circumstantial evidence, C particularly as in this case, when there is a reasonable likelihood of the existence of another person who could have committed the offence (see *R v. Abbot* [1955] 2 All ER 899 and *PP v. Muhamad Nasir Sharuddin & Anor* [1994] 2 MLJ 576).

D **[35]** For reasons discussed above, the prosecution has not discharged its burden in this case before us. The most damning evidence against the prosecution was the presence of the man with the foul body odour in the apartment and the scientifically proven DNA of the "Unknown Male 1" recovered from the E deceased's body which remains unrebutted.

[36] The learned trial judge was right in deciding not to call for the defence at the close of the prosecution and acquitting and discharging the accused at that stage. I dismiss this appeal and F affirm the decision of the learned trial judge and that of the Court of Appeal.

[37] My learned brothers Arifin bin Zakaria, Nik Hashim bin Nik Ab. Rahman, Hj. Hashim bin Dato' Hj. Yusoff and Zulkefli bin Ahmad Makinudin, FCJJ, have seen this judgment in draft and G have expressed their concurrence.

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